APPENDIX A

439 F.3d 1378

United States Court of Appeals,
Federal Circuit.

Lawrence R. RAGARD, Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

No. 05-5127.

March 6, 2006.

Before MICHEL, Chief Circuit Judge, FRIEDMAN, Senior Circuit Judge, and LINN, Circuit Judge.

OPINION OF THE COURT

FRIEDMAN, Senior Circuit Judge.

Under a pre-trial diversion agreement, the District of Columbia Corporation Counsel agreed that, if the criminal defendant performed specified community service, pending charges against him, a captain in the United States Army ("Army"), would be dismissed. Both sides performed the agreement, and the criminal charges were dismissed. The ultimate question in this appeal is whether that agreement barred the Army from subsequently court martialling the defendant for a different offense arising from the same conduct as the District of Columbia charge. We hold that

the agreement did not bar the court martial. We therefore affirm the Court of Federal Claim's dismissal of the present case challenging the court martial, but on a different ground than that court gave.

The basic facts are undisputed. Following the arrest of the appellant Lawrence R. Ragard, then a Captain in the Army, by the United States Park Police for engaging in lewd acts in violation of D.C.Code § 22-1312(a) (formerly D.C.Code § 22-1112(a)), an Assistant District of Columbia Corporation Counsel charged him in a District of Columbia court with indecent exposure, also in violation of D.C.Code § 22-1312(a). (On May 26, 2004, the Office of the Corporation Counsel for the District of Columbia was renamed the Office of the Attorney General for the District of Columbia. *See* Mayor's Order 2004-92, 51 D.C.Reg. 6052 (2004).) Ragard then entered into a pre-trial diversion agreement with the District ***1380** of Columbia, under which he agreed to perform 40 hours of community service and the Corporation Counsel agreed to dismiss the pending indecent exposure charge. (This is a procedure under which certain defendants are "diverted" from the criminal justice system into an alternative rehabilitation program.) Ragard performed his community service and the Assistant Corporation Counsel *nolle prossed* the criminal charge.

In the interim, the Army instituted court martial proceedings against Ragard, based on the same conduct. It charged him with sodomy, conduct unbecoming an officer, and commission of an indecent act. Ragard moved to dismiss the charges as constituting double jeopardy and barred by the diversion agreement. The court martial denied the motion, ruling that the military prosecution would not constitute double jeopardy and that the District of Columbia Corporation Counsel could not bind the Army.

Ragard pled guilty to the sodomy charge, and was sentenced to be dismissed from the Army, fined $5,000.00, and reprimanded. He appealed his conviction and sentence through the military appellate courts, which rejected his contentions of double jeopardy and breach of contract. *United States v. Ragard*, 56 M.J. 852, 854 (CCA 2002), *summarily aff'd*, 57 M.J. 468 (CAAF 2002), *motion for rehearing denied*, 58 M.J. 130 (CAAF 2003).

He then filed the present case in the United States Court of Federal Claims, challenging his court martial conviction and sentence, and seeking reinstatement and backpay. (The Court of Federal Claims has jurisdiction to collaterally review a court martial "if the action is otherwise within [its] jurisdiction, as it is ··· for back pay and reinstatement." *Bowling v. United States*, 713 F.2d 1558, 1560 (Fed.Cir.1983). *See Matias v. United States* 923 F.2d 821 (Fed.Cir.1990).) That court dismissed the suit for lack of jurisdiction. It first held that Ragard had not been subjected to double jeopardy. It then ruled that the question of whether the diversion agreement barred the court martial was a factual issue that the military courts had resolved against Ragard, and that the court had no jurisdiction to re-examine that factual determination.

Ragard did not raise the double jeopardy point before us either in his brief or in his oral argument. We therefore view that argument as abandoned before this court and shall not discuss it further.

II

Without reaching the merits, the Court of Federal Claims dismissed the suit for want of jurisdiction, on the ground that the military courts' interpretation of the diversion agreement as not barring the Army court martial was a factual determination that it did not have jurisdiction

to review. The interpretation of a contract, however, is a question of law, not of fact, *see* Cienega Gardens v. United States, 194 F.3d 1231, 1239 (Fed.Cir.1998), which the Court of Federal Claims had jurisdiction to decide, *see* Longval v. United States, 41 Fed.Cl. 291 (1998). The answer to that legal question is clear, however: the agreement did not bar the court martial. Accordingly, rather than remanding the case to the Court of Federal Claims to decide the question initially, we affirm the Court of Federal Claim's dismissal of the complaint on the alternative ground that Ragard failed to state a claim upon which relief could be granted.

The record on appeal does not contain any document identified as the "diversion agreement" and we do not know whether such a document exists. Other documents in the record and the parties' presentations, however, leave no doubt what that agreement states. It provides that if Ragard performed 40 hours of community **1381* service, the District of Columbia Corporation Counsel would dismiss the pending criminal charges against him for violation of the District of Columbia Code.

Nothing in the diversion agreement even suggests, let alone provides, that performance of the agreement will bar the Army from court martialling Ragard for conduct that violates the Uniform Code of Military Justice. The agreement purports to deal only with the pending District of Columbia criminal proceeding, not with other criminal proceedings that might be brought by some other entity.

Indeed, there is no basis here upon which the District of Columbia Corporation Counsel would have authority to prohibit the Army from court martialling Ragard. Ragard cites cases stating that, in other contexts, the District of Columbia is a federal entity. He points out that the Army also is a federal entity, and then argues that the agreement

by the first entity to dismiss the District of Columbia criminal case should somehow be extended to bar the military entity from court martialling him for the same conduct on which the District of Columbia criminal prosecution was based.

Although the District of Columbia is a federal entity, it is also an independent one. It has its own laws, its own government, and its own elected and appointed officials. The District of Columbia Corporation Counsel (now the Attorney General of the District of Columbia), appointed by the Mayor, is the District of Columbia's chief legal officer.

The United States Attorney for the District of Columbia generally is in charge of "conduct[ing] in the name of the United States" "criminal prosecutions" for offenses under the District of Columbia Code. D.C.Code § 23-101(c). That statute contains exceptions, however, under which prosecution for certain minor offenses "shall be conducted in the name of the District of Columbia by the Corporation Counsel for the District of Columbia or his Assistants ...." One of the categories of offenses that the Corporation Counsel is to prosecute in the name of the District of Columbia is "lewd, indecent, or obscene acts." D.C.Code § 23-101(b).

When the Assistant Corporation Counsel filed charges of indecent exposure against Ragard and then agreed in the diversion agreement to dismiss those charges if Ragard performed specified community service, he was acting solely for the District of Columbia pursuant to the foregoing statutory authority. The United States Attorney for the District of Columbia had no involvement in Mr. Ragard's prosecution or the execution and performance of the diversion agreement. Only the District of Columbia, not the United States, was a party to and bound by that agreement. The Corporation Counsel had no authority in the

diversion agreement to bind the Army not to court martial Ragard, and the agreement did not do so.

CONCLUSION

The judgment of the Court of Federal Claims dismissing Ragard's suit is

AFFIRMED

APPENDIX B

In the United States Court of Federal Claims

No. 04-267C

Filed: March 31, 2005

NOT TO BE PUBLISHED

LAWRENCE R. RAGARD,	*	Jurisdiction;
	*	Motion to Dismiss;
Plaintiff,	*	RCFC 12(b)(1);
	*	RCFC 12(b)(6);
v.	*	Tucker Act, 28 U.S.C.
	*	§ 1491(a)(1).
	*	
THE UNITED STATES,	*	
	*	
Defendant.	*	
	*	

MEMORANDUM OPINION

BRADEN, *Judge*.

FACTUAL BACKGROUND[1]

[1] The relevant facts recited herein were derived from: the February 27, 2004 Complaint ("Compl.") and Exhibits thereto; May 11, 2004 Defendant's Motion to Dismiss ("Gov't Mot. To Dismiss") and Appendix; August 6, 2004 Plaintiff's Opposition ("Pl. Opp."); and September 22, 2004 Defendant's Reply ("Def. Reply").

On October 14, 1997, a United States Park Police Officer arrested Plaintiff, a Captain in the United States Army, in Rock Creek Park, located in the District of Columbia ("D.C."). *See* Compl. ¶ 5. Plaintiff was arrested for engaging in lewd acts, in violation of D.C. Code § 22-1312(a). *Id.*[2] Thereafter, an Assistant Corporation Counsel in the Office of the D.C. Corporation Counsel,[3] changed the charge to indecent exposure in violation of D.C. Code § 22-1312(a). *See* Gov't Mot. to Dismiss Appendix at 4. On October 30, 1997, Plaintiff was arraigned in the Superior Court in the District of Columbia on the indecent exposure charge. *See* Compl. ¶ 6.

On November 3, 1997, Plaintiff entered into an agreement with the D.C. Corporation Counsel to participate in a Pretrial Diversion Program and perform forty hours of community service in exchange for dismissal of the indecent exposure charges ("the Agreement"). *Id.* at ¶ 7. Thereafter, Plaintiff completed community service under the supervision of the D.C. Superior Court Social Services Division, Special Services Branch in December 1997. *Id.* at ¶¶ 8-9. On March 18, 1998, pursuant to the Agreement, the D.C. Corporation

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[2] D.C. Code § 22-1312(a) provides: "It shall not be lawful for any person or persons to make 2 any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal, or to commit any other lewd, obscene, or indecent act in the District of Columbia, under penalty of not more than $300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense."

[3] The D.C. Corporation Counsel is responsible for prosecuting violations of the D.C. Code, on behalf of the District of Columbia. *See* D.C. Code § 23-101(a) ("Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia by the Corporation Counsel for the District of Columbia or his assistants[.]").

Counsel dismissed the indecent exposure charge by *nolle prosequi*[4]. *Id.* at ¶ 12; *see also United States* v. *Ragard*, 56 M.J. 852, 854 (C.C.A. 4 2002).

PROCEDURAL HISTORY

On December 19, 1997, the United States Army ("Army") initiated court-martial proceedings against Plaintiff. *See* Compl. ¶ 13; *see also Ragard*, 56 M.J. at 854. On March 2, 1998, the following charges were referred to the Army's Convening Authority[5]: sodomy (Article 125, Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 925); conduct unbecoming an officer (Article 133, UCMJ, 10 U.S.C. § 933); and commission of an indecent act (Article 134, UCMJ, 10 U.S.C. § 934). *See* Compl. ¶ 13. The court-martial charges were based on Plaintiff's October 14, 1997 arrest in Rock Creek Park. *Id.*

Plaintiff moved to dismiss the court-martial charges on two grounds. First, on August 25, 1998, Plaintiff filed a Motion to Dismiss, claiming that he was placed in jeopardy for being charged twice for unlawful conduct that occurred once. *See Ragard*, 56 M.J. at 854; *see also* Compl. ¶ 14. Second, on September 18, 1998, Plaintiff filed a second Motion to Dismiss, claiming that the Army was bound by the terms of the Agreement once Plaintiff completed the

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[4] *Nolle prosequi* is a "formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further." BLACK'S LAW DICTIONARY 1070 (7th ed. 1999) (quoting 22A C.J.S. *Criminal Law* § 419 at 1 (1989)).

[5] A unique aspect of the military justice system is the post-trial review by the Convening Authority. In a general court-martial ruling, which includes a punitive discharge, the Convening Authority reviews the trial record and may "suspend all or part of the sentence, disapprove a finding or conviction or lower the sentence." *Military Courts-Martial: An Overview* at 5-6; *see also* RCM 1107

required community service. On October 13, 1998, the military trial court denied Plaintiff's motions and ruled that the Fifth Amendment of the United States Constitution's proscription against double jeopardy did not apply, as a matter of law. *See Ragard*, 56 M.J. at 854. In addition, the military trial court held that the D.C. Corporation Counsel Office could not represent the United States and therefore the Agreement did not bind the Army. *Id.* Accordingly, Plaintiff's Motion to Dismiss was denied and subsequently Plaintiff pled guilty to sodomy. *Id.* at 854; *see also* Compl. ¶ 14.[6] The military trial court, however, recommended that the Convening Authority suspend dismissal from the Army because Plaintiff "suffered from several debilitating diseases, which were incurred while on active duty, relating to his HIV status." Compl. ¶ 15.

Notwithstanding this recommendation, the Convening Authority[7] approved the adjudged sentence of a dismissal from the Army, forfeiture of $1,000 pay per month for five months, and a reprimand. *See Ragard,* 56 M.J. at 853; *see also* Compl. ¶ 16.

On August 23, 2000, Plaintiff appealed the military trial court's October 13, 1998 decision to the United States Army Court of Criminal Appeals.[8] *See* Compl. ¶ 17. In that

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[6] The military trial court entered findings of not guilty regarding charges of conduct unbecoming an officer and indecent acts with another. *See Ragard*, 56 M.J. at 853 n.1.

[7] A Convening Authority generally consists of at least a Commissioned Officer in command of the accused's unit. *See* Rules for Courts-Martial ("RCM") 103(6); *see also* Estela I. Velez Pollack, *Military Courts-Martial: An Overview* 3, Congressional Research Service, May 26, 2004, *available at* http://www.fas.org/man/crs/RS21850.pdf.

[8] If a commissioned officer is sentenced to dismissal under a general court-martial that decision is subject to an automatic appeal to a service

tribunal, Plaintiff again argued that he was placed in double jeopardy by the Army because the District of Columbia dismissed the charge of indecent exposure after Plaintiff fulfilled the terms of the Agreement. *SeeRagard*, 56 M.J. at 853. Plaintiff also claimed that the Army breached the Agreement by conducting court-martial proceedings. *Id.* In addition, Plaintiff challenged the appropriateness of his dismissal from the Army. *Id.* Although the United States Army Court of Criminal Appeals held that the case raised questions of first impression, the conviction below was affirmed. *Id.* at 853-54.

On October 28, 2002, Plaintiff appealed to the United States Court of Appeals for the Armed Forces ("CAAF"). *See* Compl. ¶ 19; *see also United States* v. *Ragard*, 57 M.J. 468 (CAAF 2002). The CAAF summarily denied the petition. *See Ragard*, 57 M.J. at 468. On January 7, 2003, Plaintiff filed a motion to reconsider that subsequently was denied. *See United States* v. *Ragard*, 58 M.J. 130 (CAAF 2003).

On February 27, 2004, Plaintiff filed a Complaint in the United States Court of Federal Claims to: set aside the Army court-martial conviction; restore Plaintiff to active duty, with all pay and allowances retroactive to the date of discharge; and request reasonable attorneys fees and other relief. *See* Compl. at Prayer.

DISCUSSION

United States Court of Criminal Appeals. *See*RCM 1110; *see also* 10 U.S.C. § 866. If a military trial court affirms the conviction, plaintiff may request discretionary review first . . . by the United States Court of Appeals for the Armed Services and then by United States Supreme Court. *See* 10 U.S.C. § 867; 28 U.S.C. § 1259; *see also MilitaryCourts-Martial: An Overview* at 6.

A. Jurisdiction.

Judgments by courts-martial generally are not subject to direct review by federal civil courts. *See Matias* v. *United States*, 923 F.2d 821, 823 (Fed. Cir. 1990) ("[J]udgments by courts-martial [are] not subject to direct review by federal civil courts[.]"). *Id.* The United States Court of Federal Claims, however, may exercise jurisdiction to hear collateral attacks on court-martial convictions but only where a constitutional challenge is serious enough to warrant an exception to the rule of finality, *i.e.*, within the court-martial proceeding there was "such a deprivation of fundamental fairness as to impair due process." *Bowling* v. *United States*, 713 F.2d 1558, 1560, 1561 (Fed. Cir. 1983). Questions of fact, however, cannot be collaterally attacked. *See Matias*, 923 F.2d at 823 (quoting *Flute* v. *United States*, 535 F.2d 624, 626 (Ct. Cl. 1976)). Therefore, the United States Court of Federal Claims may only review whether the military gave "fair consideration" to each of Plaintiff's claims. *See Matias*, 923 F.2d at 826.

B. Standard of Review.

The United States Supreme Court narrowly defined the scope of review regarding a courtmartial in *Burns* v. *Wilson*, 346 U.S. 137 (1953):

> [I]t is not the duty of the civil courts simply to . . . reexamine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations . . . It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims.

Id. at 144.

C. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiff's Claims.

1. Plaintiff Was Not Subjected To Double Jeopardy.

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The purpose of prohibiting double jeopardy is to protect individuals from being subjected to trial and possible conviction for the same criminal offense on more than one occasion. *See, e.g., Brown* v. *Ohio*, 432 U.S. 161, 165 (1977) (quoting *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) ("The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."); *Serfass* v. *United States*, 420 U.S. 377, 387-88 (1975) ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense."). The United States Supreme Court has held that in a nonjury trial, "jeopardy attaches when the court begins to hear evidence." *Id.* at 388 (quoting *McCarthy* v. *Zerbst*, 85 F.2d 640, 642 (10th Cir. 1936)). The Court, therefore, consistently has held that "[J]eopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge.'" *Id.* (quoting *United States* v. *Jorn*, 400 U.S. 470, 479 (1971).

The D.C. Corporation Counsel never prosecuted Plaintiff for the indecent exposure charge. Therefore, Plaintiff was never "put to trial before a trier of the facts." *Id.* The Agreement was not an acquittal because it was not an adjudication. Moreover, an entry of *nolle prosequi* does not bar prosecution for the same offense by the military because such terminations are not acquittals. *See Dortch* v. *United States*, 203 F.2d 709, 710 (6th Cir. 1953).

Assuming *arguendo*, that community service is considered punishment, double jeopardy does not apply because Plaintiff was punished for two separate offenses. A person may be punished twice for the same conduct only if two offenses arise out of the conduct and are sufficiently distinguishable. In *Blockburger* v. *United States*, 284 U.S. 299 (1932), the Court stated that:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Id. at 304.

The United States Supreme Court also has held that the Fifth Amendment forbids "successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown* v. *Ohio*, 432 U.S. 161, 169 (1977). Generally, a lesser offense requires no proof beyond which is required for the greater offense. *Id.* at 168. The elements of the offense of sodomy and indecent exposure are not the same. The offense of indecent exposure requires a "disturbance of the public peace," thus the act must be done

in public. *See* D.C. Code § 22-1312(a).[9] Sodomy requires that the offender engage in "unnatural carnal copulation with another person." Art. 125, UCMJ, 10 U.S.C. § 925.[10] Neither offense is a lesser included offense of the other. Since sodomy and indecent exposure are two separate offenses, punishment for each does not violate the double jeopardy clause. *SeeBlockburger*, 284 U.S. at 304.

2. The Interpretation Of The Agreement Is A Question Of Fact For The MilitaryCourt.

Plaintiff argues that the Agreement was a contract that the United States violated by subjecting Plaintiff to a court-martial conviction of sodomy. *See* Compl Count II; *see also* Pl. Opp. at 8-9.

The United States Army Court of Criminal Appeals analyzed the evidence surrounding the pretrial agreement and held:

> At no time during the negotiations between [Plaintiff] and the D.C. Corporation Counsel Office did any representative of that office indicate to the appellant any intention to bind any other agency but the D.C. Corporation Counsel Office . . . [Moreover, Plaintiff] states that it was his understanding that the agreement applied to all potential charges stemming from the

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[9] "It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal, or to commit any other lewd, obscene, or indecent act in the District of Columbia, under penalty of not more than $300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense." D.C. Code § 22-1312(a).

[10] "Any person . . . who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy." 10 U.S.C. § 925.

> incident. We find no evidence to support such an understanding. On the contrary, a reasonable reading and interpretation of the agreement under the facts of this case do not leave a reasonable person to conclude that successful completion of the District of Columbia's pretrial diversion program would forever bar prosecution under the UCMJ as a result of the incident.

Ragard, 56 M.J. at 856.

The United States Court of Federal Claims does not have jurisdiction to re-examine questions of fact resolved by military courts. *See Bowling*, 713 F.2d at 1561 ("[Q]uestions of fact resolved by military courts cannot be collaterally attacked."). Accordingly, the decision of the United States Army Court of Criminal Appeals that the Agreement applied only to the District of Columbia is binding as a matter of law.

CONCLUSION

Plaintiff has failed to demonstrate the existence of a constitutional violation that impaired the court-martial and military appellate proceedings. The record evidences that the military trial court gave fair consideration to each of Plaintiff's arguments. Therefore, Plaintiff's claims in this court are dismissed for lack of subject matter jurisdiction. The Clerk is hereby directed to dismiss the February 27, 2004 Complaint.

IT IS SO ORDERED.

SUSAN G. BRADEN
Judge

APPENDIX C

56 M.J. 852

U.S. Army Court of Criminal Appeals.

UNITED STATES, Appellee,
v.
Captain Lawrence R. RAGARD, United States Army, Appellant.

ARMY 9801508.

29 March 2002.

Before CAIRNS, Senior Judge, CHAPMAN, and BROWN, Appellate Military Judges.

OPINION OF THE COURT

CHAPMAN, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, in accordance with his pleas, of sodomy, in violation of Article 125, Uniform Code of Military Justice, 10 U.S.C. § 925 [hereinafter UCMJ].[1] The convening authority approved the adjudged sentence of a dismissal, forfeiture of $1000.00 pay per month for five

[1] The appellant also was charged with conduct unbecoming an officer and gentleman and indecent acts with another, in violation of Articles 133 and 134, UCMJ. The military judge entered findings of not guilty to both charges and their specifications.

months, and a reprimand.[2] This case is before this court for review pursuant to Article 66, UCMJ, 10 U.S.C. § 866.

The appellant asserts in his first assignment of error that the double jeopardy clause of the Fifth Amendment[3] barred his prosecution by court-martial. He maintains that he was twice placed in jeopardy for the same conduct because the District of Columbia (D.C.), which initially charged him with indecent exposure in violation of the District of Columbia Code (D.C.Code), dismissed that charge after the appellant fulfilled the terms of a pretrial diversion agreement. In a second assignment of error, the appellant questions the appropriateness of his sentence to a dismissal. After carefully examining the record of trial, reviewing the appellant's and the government's briefs, and hearing oral argument, we find no merit in either assignment of error.

BACKGROUND

The facts leading to the appellant's court-martial are not in dispute. On 14 October 1997, a park police officer, while patrolling a section of Rock Creek Park, a national public park located in Washington, D.C., observed a group of four or five men rubbing their groin areas while watching two other men engaged in oral sex a short distance away. One of the two men engaged in oral sex was the appellant. The appellant admitted at his court-martial during the providence inquiry[4] that he placed the other individual's penis into his mouth, thereby committing the offense of sodomy.

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[2] The military judge also recommended that the convening authority suspend the dismissal.

[3] U.S. Const. amend. V.

[4] *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247, 1969 WL 6059 (1969).

After the appellant's arrest, the District of Columbia charged him with commission of a lewd act in violation of D.C.Code Ann. § 22-1112(a) (1981). An Assistant Corporation Counsel, Office of the D.C. Corporation Counsel (D.C. Corporation Counsel Office), later changed the charge to indecent exposure, also in violation of § 22-1112(a) of the D.C.Code.[5,6] On 30 October 1997, the appellant*854 was arraigned in the Superior Court of the District of Columbia on the indecent exposure charge, and a trial date was set for 19 February 1998.

Prior to his trial date, on or about 3 November 1997, the appellant was voluntarily placed in a pretrial diversion program.[7] Pursuant to this program, the appellant agreed to maintain contact with a community service worker and to complete forty hours of community service. In return, the D.C. Corporation Counsel Office would dismiss the charge against the appellant upon successful completion of the

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[5] The Corporation Counsel, or his assistants, conduct prosecutions for violations of this section of the D.C.Code in the name of the District of Columbia. § 23-10 (a), D.C.Code.

[6] It is unclear as to why the initial charge of lewd acts was changed to indecent exposure. In his pleadings on a motion to dismiss made at trial, the appellant related that the charge was changed to accommodate his placement in a pretrial diversion program. The trial counsel believed the change was due to a prior ruling that the offense of lewd acts under the D.C.Code was unconstitutional. Whatever the reason for the change, it is not crucial to our decision in this case.

[7] Although pretrial diversion programs may vary from jurisdiction to jurisdiction, all are alternatives to the traditional process of prosecution of criminal defendants. Each seeks to divert certain offenders from the traditional criminal justice system, substituting supervision by a probation officer or other official and community service, instead of trial and punishment.

appellant's community service. The appellant completed his required community service on 5 December 1997. The D.C. Corporation Counsel Office dismissed the indecent exposure charge by *nolle prosequi*[8] on 18 March 1998.

On 19 December 1997, the appellant's command preferred court-martial charges stemming from the appellant's conduct on 14 October 1997. On 2 March 1998, the convening authority referred charges of sodomy (Article 125, UCMJ), conduct unbecoming an officer by performing fellatio on another in a public area (Article 133, UCMJ, 10 U.S.C. § 933), and commission of an indecent act by performing fellatio on another in a public area (Article 134, UCMJ, 10 U.S.C. § 934) to a general court-martial. Prior to his pleas, the appellant unsuccessfully moved to dismiss all charges and their specifications, arguing that the United States Army (Army) was precluded from prosecuting him because: (1) he was twice placed in jeopardy for the same conduct; and (2) that the Army was bound by the terms of the pretrial diversion agreement once the appellant satisfied his obligations under the agreement. The military judge disagreed and ruled that because jeopardy never attached in the District of Columbia case, the Fifth Amendment's proscription against double jeopardy did not apply. She further found that the D.C. Corporation Counsel Office did not represent the United States and that the appellant's agreement with the D.C. Corporation Counsel Office did not bind the Army. After the military judge denied his motion to dismiss, the appellant pled guilty to sodomy.

DISCUSSION

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[8] *Nolle prosequi* is defined as "a formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further." *Black's Law Dictionary* 1070 (7th ed.1999) (quoting 22A C.J.S. *Criminal Law* § 419, at 1 (1989)).

I. DOUBLE JEOPARDY

This case presents a situation peculiar to the District of Columbia and its unique relationship with other federal entities. The issues raised by the appellant and the facts of this case present questions of first impression for this court. There are no military cases that speak directly to the ultimate issues at hand. Similarly, there are no other federal or District of Columbia decisions that provide definitive answers. With this in mind, we begin our analysis with the appellant's assertion that the Fifth Amendment's prohibition against double jeopardy bars his trial by court-martial.[9]

In order to address whether double jeopardy exists under the facts of this case, we must first decide whether jeopardy attached when the D.C. Corporation Counsel Office *855 dismissed the indecent exposure charge, as a result of the appellant's successful completion of a pretrial diversion program. The appellant argues that he was "prosecuted" by the District of Columbia for his conduct on 14 October 1997 when he entered into and successfully completed a pretrial diversion agreement. He maintains that jeopardy attached when the D.C. Corporation Counsel Office entered a *nolle*

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[9] Under the facts of this case, we decline to hold that the appellant waived his claim of double jeopardy by pleading guilty. Prior to his plea, the appellant moved to dismiss all charges and their specifications on double jeopardy grounds. Thus, because the issue could be resolved on the existing record, the appellant's guilty plea does not bar his claim. *See* *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975); *United States v. Collins*, 41 M.J. 428 (1995). We do not hold, however, that a double jeopardy claim may never be waived. *See* Rule for Courts-Martial 907(b)(2)(C); *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989).

prosequi decision in regard to his case. We find no case law to support the appellant's assertions, and hold that the appellant's double jeopardy claim fails because jeopardy had not attached.

The double jeopardy clause of the Fifth Amendment "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (footnotes omitted)). It also is clear that the constitutional guarantee against double jeopardy does not apply before jeopardy attaches. *Serfass v. United States*, 420 U.S. 377, 390-91, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975). The Supreme Court and military courts have consistently held that jeopardy does not attach until an accused is "put to trial before the trier of the facts, whether the trier be a jury or a judge." *Id.* at 388, 95 S.Ct. 1055 (quoting *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971)). In the case of a jury or members trial, jeopardy attaches when a jury or court-martial panel is empanelled and sworn. *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978); *Downum v. United States*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963); *United States v. Hutchinson*, 49 M.J. 6 (1998); *United States v. Cook*, 12 M.J. 448 (C.M.A.1982). In a nonjury or judge alone trial, jeopardy attaches when the court begins to hear evidence. *Serfass*, 420 U.S. at 388, 95 S.Ct. 1055; *Cook*, 12 M.J. at 453; *United States v. Chavez*, 6 M.J. 615, 620 (A.C.M.R.1978).

In the appellant's case, the facts before this court clearly demonstrate that the appellant was never "subjected to the hazards of trial and possible conviction." *See Green v.*

United States, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Despite the appellant's statements to the contrary, he was never "prosecuted" by the District of Columbia's court system.[10] Pretrial diversion programs do not make a final determination of guilt or innocence. No evidence was ever presented to a trier of fact. There was no adjudicative process. A resulting *nolle prosequi* decision, unlike an acquittal or conviction, does not bar a second prosecution for the same offense. *See Dortch v. United States*, 203 F.2d 709 (6th Cir.), *cert. denied*, 346 U.S. 814, 74 S.Ct. 25, 98 L.Ed. 342 (1953); *United States v. Foster*, 226 A.2d 164 (D.C.1967); *Newman v. United States*, 410 F.2d 259 (D.C.Cir.1969); *Hensley v. United States*, 160 F.2d 257 (D.C.Cir.1947).

The double jeopardy clause also has been interpreted to bar the imposition of multiple punishments for the same offense. *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); *North Carolina v. Pearce*, 395 U.S. at 717-18, 89 S.Ct. 2072. The appellant's voluntary community service, with no restrictions on freedom or deprivations of liberty interests, does not amount to the imposition of punishment triggering a double jeopardy inquiry.

Assuming, arguendo, that the appellant was punished by the District of Columbia, the double jeopardy bar does not apply because the appellant was punished for two different offenses. The double jeopardy clause is only implicated if the legislature intended that the crimes be treated as the same offense. To determine Congress' intent, we apply the "same-elements" test of *Blockburger v. United States*, 284 U.S. 299,

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[10] The same civilian defense counsel represented the appellant both at trial and on appeal. In contrast to his assertions on appeal, counsel conceded at trial that jeopardy had not attached. He admitted that "[t]his isn't a double jeopardy case."

52 S.Ct. 180, 76 L.Ed. 306 (1932). Under *Blockburger*, the test for whether the double jeopardy clause permits multiple punishments or multiple prosecutions arising out of the same conduct is "whether each [distinct *856 statutory] provision requires proof of a fact which the other does not." *Id.* at 304, 52 S.Ct. 180. Utilizing the *Blockburger* analysis in the present case, we conclude that the crimes are different offenses. The sodomy charge requires a finding that the appellant engaged in unnatural carnal copulation; indecent exposure does not.[11] Indecent exposure requires that the act be done in public or viewed by a third party; sodomy does not. One is not a lesser included offense of the other. Therefore, even if there were multiple punishments in this case, the appellant's crimes are separate offenses under the *Blockburger* test and, thus, the punishments did not violate the double jeopardy clause.

For the reasons stated above, we hold that the appellant had not been put in prior jeopardy, nor subjected to multiple punishment for the same offense, as a result of his placement in and his completion of the District of Columbia's pretrial diversion program. There was no violation of the Fifth Amendment's double jeopardy clause.[12]

II. BREACH OF CONTRACT

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[11] We assume, but need not decide, that the District of Columbia must have charged the appellant with indecent exposure under the law of principals.

* Corrected

[12] Because jeopardy had not attached, we need not consider the question of whether the District of Columbia and the Army are separate and distinct sovereigns for double jeopardy purposes.

The appellant also alleges that fulfillment of his obligation under the terms of the pretrial diversion agreement with the D.C. Corporation Counsel Office precludes the Army from prosecuting him for any offenses stemming from the events of 14 October 1997. He maintains that the Army was a party to the agreement and, thus, bound by its terms. On brief and in oral argument, the appellant blurs this allegation with double jeopardy and sovereignty issues. Nevertheless, as the appellant frames the issue as a breach of contract, we look at ordinary principles of contract law to determine if the Army is bound by the terms of the agreement.

A pretrial diversion agreement is a contract. *See* United States v. Hicks, 693 F.2d 32 (5th Cir.1982). As a general rule, examination of the written instrument determines the identity of the parties to a contract. *See* 17A C.J.S. *Contracts* § 363 (1999). The explicit terms of the agreement in this case are not ambiguous and, clearly, do not purport to bind the Army. As stated in the "Notice of Eligibility" given to the appellant, the D.C. Corporation Counsel Office agreed to dismiss the charge of indecent exposure in the D.C. Superior Court if the appellant successfully completed forty hours of community service. At no time during the negotiations between the appellant and the D.C. Corporation Counsel Office did any representative of that office indicate to the appellant any intention to bind any other agency but the D.C. Corporation Counsel Office. "A person [or agency] who is not named in a contract and who has not signed or executed it ordinarily is not bound by its terms." *Id.* at 411. *See also* Int'l Customs Assocs., Inc. v. Ford Motor Co., 893 F.Supp. 1251 (S.D.N.Y.1995). The appellant states that it was his understanding that the agreement applied to all potential charges stemming from the incident. We find no evidence to support such an understanding. On the contrary, a reasonable reading and

interpretation of the agreement under the facts of this case do not leave a reasonable person to conclude that successful completion of the District of Columbia's pretrial diversion program would forever bar a prosecution under the UCMJ as a result of the incident.

Thus, we find that the pretrial diversion agreement, by its own explicit terms, only applies to the appellant and the D.C. Corporation Counsel Office. As a matter of law, we hold that the agreement is unambiguous, and should be interpreted and enforced accordingly. In doing so, we hold that the Army was not a party to the pretrial diversion agreement and, thus, not bound by its terms.

III. SENTENCE APPROPRIATENESS

The appellant argues that his sentence to a dismissal is inappropriately severe. He requests that this court reassess the sentence *857 and provide meaningful sentence relief by disapproving his dismissal. We disagree that the sentence is inappropriate and decline to grant relief.

In determining sentence appropriateness, we must give " 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.' " *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A.1982) (quoting *United States v. Mamaluy*, 10 U.S.C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81, 1959 WL 3587 (C.M.A.1959)). The appellant contends that because he is afflicted with Acquired Immune Deficiency Syndrome (AIDS), a dismissal would harm his ability to obtain treatment for that disease and endanger his life. He urges that this court give "substantial weight" to his medical condition in determining an appropriate sentence. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the

punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A.1988). Clemency, on the other hand, "involves bestowing mercy." *Id.* However, Congress did not give this court the power to bestow clemency on a deserving accused when it enacted Article 66, UCMJ. *See id.* at 395-96. Regardless of how sympathetic we may be to the collateral consequences of the appellant's dismissal, we are powerless to grant clemency.

Considering the record as a whole and the nature and seriousness of the appellant's misconduct, as well as his military character and his medical circumstances, we hold that the sentence approved by the convening authority is both just and appropriate. The appellant's misconduct merits separation under conditions of dishonor.

Accordingly, the finding of guilty and the sentence are

affirmed.

Senior Judge CAIRNS and Judge BROWN concur.

APPENDIX D

57 M.J. 468

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Daily Journal

Monday, October 28, 2002

03-018

PETITIONS FOR GRANT OF REVIEW DENIED

No. 02-0570/AR. U.S. v. Lawrence R. Ragard. CCA 98-01508.[1]

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[1] SULLIVAN, Senior Judge (dissenting)*:

I would grant review of Issues I and II raised by appellant:

I. DO DOUBLE JEOPARDY PRINCIPLES UNDER THE FIFTH AMENDMENT BAR THE COURT-MARTIAL OF A SOLDIER WHO HAS (1) ENTERED INTO A PRETRIAL DIVERSION AGREEMENT WITH THE DISTRICT OF COLUMBIA, A FEDERAL ENTITY FOR THE SAME MISCONDUCT, AND (2) SATISFIED THE TERMS OF THAT AGREEMENT?

II. DO PRINCIPLES OF CONTRACT LAW PREVENT A SOVEREIGN FROM PROSECUTING APPELLANT AFTER HE SUCCESSFULLY COMPLETES A PRETRIAL DIVERSION AGREEMENT ENTERED INTO BY REPRESENTATIVES OF THAT SAME SOVEREIGN FOR THE SAME CONDUCT?

* Senior Judge Eugene R. Sullivan took final action in this case prior to October 1, 2002.

APPENDIX E

58 M.J. 130, 58 M.J. 129

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Daily Journal

Tuesday, January 7, 2003

03-062

PETITIONS FOR RECONSIDERATION DENIED

No. 02-0570/AR. United States, appellee, v. Lawrence R. Ragard, appellant. CCA 98-01508. Appellant's petition for reconsideration of the order of the Court issued on October 28, 2002, is denied.

APPENDIX F

NOTICE OF ELIGIBILITY FOR INCLUSION IN THE PRE-TRIAL DIVERSION PROGRAM

Date:

Defendant's Name:

Date of Arraignment:

The Office of the Corporation Counsel has determined that you may be eligible for enrollment in its Pre-Trial Diversion Program, for persons charged with **Indecent Exposure.** If you wish to be interviewed and screened for the Program, you should **report to the Probation Department located at 409 E Street, N.W., Room 312.** Report no later than **five working days from today,** between the hours of **10:00 A.M and 12:00 P.M or 2:00 P.M. and 4:00 P.M., Monday through Thursday.** Bring with you, (1) this form, (2) your notice to return to Superior Court.

If you do enroll in the Program, sign an agreement to perform 40 hours of Community Service and abide by the conditions of that agreement, the Office of the Corporation Counsel will dismiss the charge against you at the conclusion of the agreed upon community service. If you do not abide by the terms of the agreement, the charge presently against you will be prosecuted in regular fashion.

Mary Ann Rodgers
Chief, General Crimes Section
Criminal Division

By: _____